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No. 87-2051

In The

Supreme Court of the United States

October Term, 1988

M.J.R., INC., et al.,

Petitioners,

vs.

CITY OF DALLAS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONERS M.J.R., INC., et al.

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QUESTIONS PRESENTED

I. Is The License Requirement of Dallas City Code § 41A-4(a) Facially Unconstitutional As An Impermissible Prior Restraint Because It Lacks Adequate Procedural Safeguards Against Censorship By Delay As Required by *Freedman v. Maryland*, 380 U.S. 51 (1965), And Numerous Subsequent Decisions Of This Court?

II. In Providing For License Denial And Revocation On The Basis Of Prior Speech Offenses, Does The Dallas Ordinance Impose A Classic Prior Restraint Of The Type Prohibited As Facially Unconstitutional Under The Rule Of *Near v. Minnesota*, 283 U.S. 697 (1931)?

III. In Providing For License Denial And Revocation On The Basis Of Various Non-Speech Violations, Does The Dallas Ordinance Impose A Prior Restraint Which Cannot Withstand Strict Scrutiny?

LIST OF PARTIES

PETITIONERS

There were three groups of Appellants in the consolidated case in the Court of Appeals. Petitioners herein are listed in Group I, and all other Appellants in Group II.

I.

M.J.R., Inc.; Tempo Tamers, Inc.; S.B. LaBare, Inc.; Allen & Burch, Inc.; Southern Belles Partnership, Inc.; D. Burch, Inc.; Deja Vu, Inc.; Corporation Lex, Inc.; and S.B. Youngbloods, Inc.

II.

FW/PBS, Inc.; DSB, Inc.; Lone Star Multi Theatres, Inc.; Bi-Ti Enterprises, Inc.; Gattie Corporation; J.R.E. Enterprises; Entertainment Unlimited; Charles E. Carlock; Beverly K. VanDusen; Bill Slaten, Jr.; Calvin Berry, III; Saujay Patel; Rudolph Fernandez; and Dallas Motel Association.

RESPONDENTS

The following parties were Appellees in the Court of Appeals; The City of Dallas, Texas; A. Starke Taylor, Mayor; and Billy Prince, Chief of Police.

There are no entities to report or list pursuant to this Court's Rule 28.1.

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BRIEF OF PETITIONERS M.J.R., INC., et al.

OPINIONS BELOW

Petitioners adopt the discussion of the Opinions Below set forth in the opening brief of petitioners FW/PBS, et al., in No. 87-2012, previously filed with this Court.

JURISDICTION

Petitioners adopt the discussion of Jurisdiction presented in the opening brief of petitioners FW/PBS, et al.,

except to point out that petitioners herein filed their petition for certiorari on June 13, 1988, and review was granted on the first two Questions Presented in this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners adopt the Constitutional and Statutory Provisions presented in the opening brief of petitioners FW/PBS, et al., as supplemented by the following additional provisions of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas (hereinafter "Dallas City Code" or "D.C.C."):

1. D.C.C. §§ 2-95 and 2-96 (defining powers and procedures of Dallas' Permit and License Appeal Board) are set forth at Joint Appendix (J.A.) 38-39.

STATEMENT OF THE CASE

Petitioners adopt the Statement Of The Case set forth in the opening brief of petitioners FW/PBS, et al., except as modified or supplemented below.

Petitioners herein all operate businesses defined by § 41A-2(3) of the Dallas City Code as "adult cabarets." The dancing featured at petitioners' adult cabarets consists of non-obscene performances which, though sexually oriented, constitute presumptively protected "speech" within the meaning of the First and Fourteenth

Amendments to the United States Constitution. Only consenting adults are allowed admission to petitioners' businesses.

On July 15, 1986 a complaint for declaratory and injunctive relief against enforcement of Chapter 41A was filed by some of these petitioners in the Northern District of Texas. On July 25, 1986 an amended complaint was filed on behalf of all these petitioners.

On August 4, 1986, the petitioners' complaint was consolidated under a single case number with similar complaints filed by the petitioners in *FW/PBS, Inc., et al. v. City of Dallas, et al.* (No. 87-2012) and *Calvin Berry, et al. v. City of Dallas, et al.* (No. 88-49). Thereafter, the three cases proceeded under a single case number in both of the courts below. In order to minimize their respective legal costs, counsel for petitioners in No. 87-2012 (*FW/PBS, Inc. v. Dallas*) agreed to do the primary briefing of the licensing issues in this case at both of the lower court levels. In turn, counsel for M.J.R., et al., agreed to do the primary legal work with respect to the zoning issues raised by the consolidated complaints.

Petitioners further supplement the statement of the case presented in No. 87-2012 by pointing out that the opening brief of appellant FW/PBS, Inc. filed in the Court of Appeals challenged the licensing requirement of Chapter 41A on a wide variety of grounds, including the claim that it constituted a prior restraint, *inter alia*, because it allowed "unconstitutionally broad discretion to licensing officials" and also because the inspection requirements of § 41A-7 are unconstitutional. Violation of those inspection requirements constitutes a ground for both the denial and

suspension of a sexually oriented business license (see §§ 41A-5(a)(9) and 41A-9(1), respectively) and, if committed twice within a year, constitutes ground for revocation of such a license (see § 41A-10(a)).

In upholding the ordinance, the panel's majority considered and rejected both of the grounds of challenge noted above, as well as numerous others.

SUMMARY OF ARGUMENT

Chapter 41A of the Dallas City Code, requiring a special license for all "sexually oriented businesses," is one of the most onerous licensing laws ever imposed on businesses engaged in First Amendment activity. In essence, this ordinance's complex and burdensome regulations allow for the censorship of an entire area of officially disapproved, though constitutionally protected, speech.

Although this law requires a license as a prerequisite to exercising fundamental rights of freedom of speech and press, the Court of Appeals analyzed its constitutionality under an unprecedented deferential standard of review rather than utilizing the settled principle that "[a]ny system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity.' " *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 316, n.13 (1980) and cases there cited. The Court of Appeals fundamentally erred by confusing laws which merely *burden* speech (e.g., laws imposing taxes or restrictive zoning requirements) with laws which absolutely *bar* speech, i.e., prior restraints.

Because the denial of a license constitutes an absolute prior restraint on all further expression, this Court has

always reserved its most exacting scrutiny for any law requiring a license to engage in expression, sexually oriented or otherwise. See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. ___, 108 S.Ct. 2138 (1988)).

A constant principle which illuminates this Court's First Amendment decisions is that regulations of protected expression must use "sensitive tools"[1] in order to remove from the public domain only that speech which is proven to be without constitutional protection. However, rather than using precise tools and focusing on particular items of expression, Dallas has followed the convenient but constitionally intolerable path of attempting to restrain all future speech by a blunderbuss approach which establishes a wide variety of overbroad or discretionary grounds justifying the denial of a license – a most virulent and effective tool for prior restraint.

The first and overarching defect affecting this entire ordinance is that it imposes the prior restraint of a license requirement without any of the procedural safeguards which this Court has found necessary to insure that judicial review will not be "too little or too late." *See, e.g., Freedman v. Maryland, supra*, 380 U.S. at 57. Although the statutory scheme is so complex that it provides the Chief of Police with a virtually endless list of available reasons for potentially denying a license, it fails to guarantee that one who has been denied a license, or whose license

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[1] *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

application has not been promptly acted upon, can obtain prompt judicial review within a specified brief period after an application is filed. The ordinance also lacks the essential procedural safeguard most recently confirmed by this Court in *Riley v. National Federation of the Blind of North Carolina*, ___ U.S. ___, 108 S.Ct. 2667 (1988), that an administrative official denying a license to engage in expression must have the burdens of initiating judicial review and justifying the denial. The need for these important procedural safeguards is heightened where, as here: (1) a special license is required for those engaged in a type of protected expression toward which government is frequently hostile; and (2) the ordinance provides a nearly endless list of potential bases for the denial of such a license.

However, even aside from its *Freedman* deficiencies, this licensing scheme is riddled with unconstitutional provisions which require its facial invalidation. First, city officials may deny or revoke a license upon proof that the licensee, the applicant, or one who *resides* with the applicant has committed a single obscenity violation. In upholding this provision, the Court of Appeals violated not only the clear prohibition of this Court's holding in *Near v. Minnesota, supra*, but also the unanimous holding of its own *en banc* court in *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir. *en banc* 1978), *aff'd. on other grounds*, 445 U.S. 308 (1980) (holding that a Texas nuisance statute would be unconstitutional if construed to allow the padlocking of theaters which had exhibited any films adjudicated to be obscene), as well as the parallel holdings of dozens of other state and lower federal courts.

Other provisions of the challenged legislation permit the denial or revocation of a license where the licensee, the applicant or one who merely *resides* with the applicant, has been convicted of certain specified non-speech offenses. In sustaining these disqualification criteria, the Court of Appeals required the City to demonstrate no more than a rational basis. Yet, strict scrutiny is mandated by this Court's prior decisions because licensure under the ordinance is a prerequisite to engaging in *any* speech, rather than a mere burden on the exercise of speech. The City has not demonstrated and cannot demonstrate that its disqualification criteria meet that demanding standard of review. As the Court of Appeals stated in *Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981): "Persons with prior criminal records are not First Amendment outcasts." "Punishment for criminal behavior must be government's response to an abuse of the privilege [of freedom of speech]; prospective restraints are unconstitutional." *Id.* at 628.

The ordinance also establishes criteria for denial, nonrenewal or revocation of a license which confer impermissibly broad *discretion* on the Chief of Police, in violation of an unbroken string of cases in this Court holding that discretionary laws licensing speech are unconstitutional *per se*. *See e.g., Lakewood v. Plain Dealer, supra*, and cases there cited. These provisions include, *inter alia*: (1) allowing the Chief to suspend or deny a license if, in the Chief's sole opinion, the applicant has "demonstrated that he is unable to operate . . . a sexually oriented business in a peaceful and law-abiding manner . . . ."; (2) the chief has discretion to suspend a license if he is of the opinion that the licensee or an employee has

"engaged in excessive use" of alcohol while on the premises; (3) the Chief of Police also has discretion to deny a license if, in his opinion, the applicant has "failed to provide information 'reasonably necessary' for issuance of the license"; and (4) under other sections, the Chief has unfettered discretion to turn down a request for renewal of a license or for reinstatement of a revoked license after all the bases for any prior denial or revocation have been corrected.

Other provisions of the ordinance provide that a license can be denied if the licensee has not submitted to warrantless searches of its premises by any of five different administrative agencies including the health department, the fire department, the housing and neighborhood services department, the building inspection department and the police department.

The ordinance also authorizes the denial of a license if any of a variety of administrative agencies have found any minor building, health or fire code violations but then precludes reapplication for a license long after the basis for the original problem has been eliminated.

In sum, the ordinance establishes a licensing requirement with disqualification criteria so limitless, and with so many discretionary and overbroad provisions, that a hostile administrative official could impose an absolute prior restraint against any applicant incurring his or her displeasure, and all under a scheme which fails to guarantee that judicial review will be anything other than "too little or too late."

Petitioners respectfully submit that the licensing scheme is so rife with constitutional difficulties that it

neither can nor should be salvaged by any feat of judicial construction. In short, the collective overbreadth is so substantial that a declaration of facial invalidity of the licensing requirement of § 41A-4(a) is warranted. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, n. 12 (1985).

For all these reasons, this Court should strike Dallas' sexually oriented business licensing law on its face.

ARGUMENT

I

THE LICENSE REQUIREMENT OF DALLAS CITY CODE § 41A-4(a) IS UNCONSTITUTIONAL ON ITS FACE AS AN IMPERMISSIBLE PRIOR RESTRAINT BECAUSE IT LACKS ADEQUATE PROCEDURAL SAFEGUARDS AGAINST CENSORSHIP BY DELAY AS REQUIRED BY *FREEDMAN v. MARYLAND*, 380 U.S. 51 (1965) AND NUMEROUS SUBSEQUENT DECISIONS OF THIS COURT.

A. The Court Of Appeals Erred In Applying The Deferential Standard Of Review Applicable To Time, Place And Manner Restrictions Rather Than The Strict Scrutiny Required Of All First Amendment Licensing Laws By *Freedman v. Maryland*.

Petitioners below stressed that the entire sexually oriented business licensing scheme was facially unconstitutional because it lacked the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965). However, the panel majority rejected this argument, asserting that this

licensing law should be analyzed under the deferential standard of review applicable to time, place and manner restrictions rather than the strict scrutiny which this Court has always applied to any law requiring a license to engage in speech activity. The following history of the *Freedman* line of cases will demonstrate the clear error of the panel majority's holding.

In *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), this Court recognized that "[t]he struggle for the freedom of the press was *primarily directed* against the power of the licensor." (Emphasis added.)

> "[T]he liberty of the press became initially a right to publish *'without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a *leading purpose* in the adoption of the constitutional provision." 303 U.S. at 451-452 (some emphases added, some in original).

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969), this Court referred to "the prior restraint of a license," recognizing that *all* laws subjecting the exercise of First Amendment freedoms to a prior license requirement act as prior restraints. Although the mere fact that licensing requirements constitute prior restraints does not make them *per se* unconstitutional,[2] nonetheless, in a long line of decisions implementing the Framer's basic hostility to laws licensing speech, this Court has

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[2] *See, e.g., Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

repeatedly stricken the overwhelming majority of such laws, applying a heightened or "strict" standard of scrutiny.[3]

This Court's exacting scrutiny of laws licensing speech is consistent with another line of its cases holding that "any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization For a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181

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[3] *See, e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939) (permit needed to lease a hall for a public meeting involving advocacy of obstruction of the government); *Schneider v. State*, 308 U.S. 147 (1939) (permit needed to distribute handbills on public streets or sidewalks); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (permit needed for charitable or religious solicitations); *Largent v. Texas*, 318 U.S. 418 (1943) (permit needed for sale of books or tracts); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (license tax for selling door to door stricken as applied to Jehovah's Witnesses engaging in First Amendment activity); *Saia v. New York*, 334 U.S. 558 (1948) (permit needed to use sound amplification devices); *Kunz v. New York*, 340 U.S. 290 (1951) (permit needed to hold public worship meetings on streets); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (permit required for exhibition of motion picture films); *Gelling v. Texas*, 343 U.S. 960 (1952) (permit required for exhibiting motion picture films); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (permit needed to solicit members for an organization); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (films could only be exhibited to minors if first permitted by a board of censors); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (parade permit); and *City of Lakewood v. Plain Dealer Publishing Co.*, ___ U.S. ___, 108 S.Ct. 2138 (1988) (annual permit needed to operate any news racks on public sidewalks).

(1968); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931)." *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 316, n.13 (1980).

Applying the principles above, two lines of cases have developed in this Court's review of licensing laws imposing a prior restraint on speech activity. The first holds that "the prior restraint of a license" for speech activities is unconstitutional if the law fails, on its face, to set forth "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth, supra*, 394 U.S. at 151. Thus, licensing laws affecting speech have been stricken whenever the criteria for granting or denying the license conferred *any* subjective discretion on the licensor.[4]

A second line of cases commenced with *Freedman v. Maryland*, 380 U.S. 51 (1965), where this Court held that a law licensing speech which lacks certain procedural safeguards "contains the same vice as a statute delegating excessive administrative discretion." *Id.* at 57. Specifically, *Freedman* held that even if such a law contained adequate limitations on the licensor's substantive discretion, it must be found facially invalid as an impermissible prior restraint if it lacks any of the following procedural safeguards:[5]

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[4] See the cases cited in footnote 3, *supra*.

[5] That the *Freedman* opinion was not in any way dependent upon the presence of any impermissible licensing criteria is clear from the Court's statement that "we have no occasion to decide whether the vice of overbroadness infects the Maryland statute." 380 U.S. at 56.

1. Mandatory *judicial* review of any administrative decision to deny a license. 380 U.S. at 58.

2. The licensor must have the burden to seek judicial review in the event a license is denied. *Id.*

3. The licensor must have the burden of proving that the license was denied for proper reasons. *Id.*

4. A requirement that within a "specified brief period" the licensor must either issue the license or file a court action to justify the denial. 380 U.S. at 59.

5. A required "prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.*

Freedman held that "[w]ithout these safeguards, it may prove too burdensome to seek review of the censor's determination." *Id. See also, City of Lakewood v. Plain Dealer Publishing Co.*, ___ U.S. ___, 108 S.Ct. 2138, 2144 and 2151 (1988). The *Freedman* opinion also observed that a licensing scheme for speech-related businesses which lacks the articulated procedural safeguards establishes "a statutory context in which judicial review may be too little and too late" (380 U.S. at 57) and that "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." 380 U.S. at 58.

Although the licensing scheme in *Freedman* required the prior submission of individual films to a board of censors for pre-exhibition approval, this Court's subsequent opinions have made clear that *Freedman*'s procedural safeguards apply not only whenever First Amendment freedoms are subjected to the prior restraint

of a license requirement,[6] but indeed whenever *any* form of prior restraint affects protected expression.[7]

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[6] See, *e.g.*, *Riley v. National Federation of the Blind of North Carolina, Inc.*, ___ U.S. ___, 108 S.Ct. 2667, 2680 (1988) (*Freedman*'s procedural safeguards apply to a content-neutral permit requirement for professional fundraisers); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (*Freedman*'s procedural requirements apply to an application by a theatrical production company for use of municipal concert hall); and *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (ordinance establishing film censorship board violated *Freedman* where 50-57 days were allowed to obtain a final administrative decision and there was no provision for a prompt and final judicial ruling). *Cf.*, *City of Lakewood v. Plain Dealer Publishing Co.*, *supra*, ___ U.S. ___, 108 S.Ct. 2138 (1988), recognizing that a litigant is constitutionally entitled to make a facial challenge, rather than a mere "as applied" challenge, to periodic and content-neutral licensing laws requiring a business license to engage in speech activity. Although the merits of the challenge presented in that case involved a law which gave the licensor substantial discretion, this Court's opinion intimated that the ordinance could not, in any event, survive a *Freedman* analysis. See 108 S.Ct. at 2151.

[7] *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (holding *Freedman*'s procedural safeguards applicable to a judicial prior restraint imposed by the issuance of a preliminary injunction of indefinite duration against the exhibition of allegedly obscene materials); *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981) (affirming without opinion court of appeals' judgment striking down Washington's moral nuisance statute because it authorized imposition of a judicial prior restraint (injunctive orders) but lacked the procedural safeguards of *Freedman*); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (judicial injunction prohibiting a parade on city streets violated *Freedman* because there was no requirement for immediate judicial appellate review); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (*Freedman*'s

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Most recently, in *Riley v. National Federation of the Blind of North Carolina, Inc.*, ___ U.S. ___, 108 S.Ct. 2667, 2680 (1988), this Court held that the procedural safeguards of *Freedman* applied to a content-neutral licensing requirement for professional fund raisers. As in *Freedman*, the *Riley* opinion noted that its procedural holding was independent of any problems the ordinance might have had based upon overbroad or discretionary licensing standards. 108 S.Ct. at 2680, n. 14. *Riley* held that the solicitation licensing requirement was impermissible not only because it failed to require the licensor to go to court to justify the denial of a license, but also because the ordinance did not "on its face . . . purport to [limit the time period within which] a determination must be made [by the licensor]." 108 S.Ct. at 2680.

Moreover, in a statement that would seem to be dispositive of the standard of review applicable here, this Court, in discussing the applicability of *Freedman*'s procedural safeguards, cited its earlier opinion in *Lakewood v. Plain Dealer, supra*, for the proposition that strict scrutiny under *Friedman* is required whenever "a state enacts a statute requiring periodic licensing of speakers, at least when the law is directly aimed at speech." *Riley, supra*, 108 S.Ct. at 2680. Accordingly, strict scrutiny must apply in the present case because Dallas has enacted an ordinance requiring periodic licensing of a variety of

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procedural requirements apply to seizures of allegedly obscene photographs by customs officials); *Blount v. Rizzi*, 400 U.S. 410 (1971) (*Freedman*'s safeguards required for seizures of allegedly obscene materials by postal authorities).

communicative businesses. The policy reasons for imposing such scrutiny are even greater in the present case because in *Lakewood* and in *Riley* the permit requirements were content-neutral (*i.e.*, in *Lakewood* they applied to *all* newsrack operators regardless of content; in *Riley* they applied to all professional fundraisers, regardless of viewpoint). In contrast, the licensing ordinance at issue here applies *only* to businesses which feature "adult" entertainment. Surely, no lesser standard of review can apply where, as here, a license law is required for those engaged in a particular type of governmentally-disfavored speech, *i.e.* sexually oriented expression.

In sum, this Court's prior decisions have never once deviated from the Framers' fundamental First Amendment precept that licensing requirements for speech are *inherently* suspect and must always be subjected to the strictest standards of judicial review to ensure that a hostile government cannot use them as tools for censorship. The Court of Appeals' decision in this case, applying a deferential standard of review, not only conflicts with this Court's settled precedent, but, if adopted by this Court, would utterly gut the protections of the First Amendment as intended by the Framers.

The Court of Appeals' opinion is also aberrational with respect to this Court's decisions defining "time, place and manner" regulations of speech. The panel majority asserted that *Freedman*'s strict scrutiny was not required because this licensing law implemented *other* provisions of the city code which, in fact, may constitute legitimate time, place and manner restrictions, *e.g.*, the adult zoning provisions of § 41A-13. However, as noted in dissent by Judge Thornberry, a licensing law is *not* a

time, place or manner restriction because it leaves open no alternative channels of speech. Rather, it prohibits the license applicant from engaging in the desired speech at any time, in any place and in any manner.

The latter distinction was first recognized by this Court in *Lovell v. City of Griffin, supra,* 303 U.S. 444, 451 (1938) when it struck down an ordinance requiring a license to distribute literature within city limits. This Court pointed out that there is "no restriction in its application with respect to time or place" and that "[t]he ordinance prohibits the distribution of literature . . . at any time, at any place, and in any manner without a permit from the city manager" (*id.*), precisely as § 41A-4(a) of the Dallas City Code does.

Finally, as a matter of both history and policy, it is imperative that this Court not accept the lesser standard of review employed by the panel majority. The *history* of the First Amendment is that licensing requirements for speech-related activities were at the very heart of the Framers' concerns when they enacted the First Amendment. If such laws are to be permitted at all (*but see Lovell v. City of Griffin, supra*), the only way to be true to the Framers' intent is to continue to require that ordinances establishing such licensing requirements must not only be narrowly drafted, but also must contain the procedural safeguards necessary to ensure that, in practice, the licensing procedure does not become so burdensome, onerous or time-consuming that judicial relief would come "too little or too late."

As a *policy* matter, there can hardly be imagined a licensing law more in need of *Freedman*'s procedural

safeguards than one that is specifically directed to those engaged in a particular type of protected speech opposed by many municipal authorities, *i.e.* sexually oriented expression. That circumstance presents the *most likely* situation in which the absence of procedural safeguards will result in the suppression of constitutionally protected expression. As will be discussed below, the Dallas licensing scheme's lack of procedural safeguards causes it to be rife with opportunities for extremely pernicious and repressive forms of administrative censorship.

B. The Dallas Licensing Ordinance Lacks Virtually Every Procedural Safeguard Which Is Mandated By The First Amendment.

The Dallas ordinance lacks every one of the five *Freedman* procedural safeguards. It contains no requirement of mandatory judicial review of a license denial; it does not impose on the licensor the obligation to seek judicial review in the event a license is denied or revoked; nor is the licensor assigned the burden of justifying the denial or revocation.

Of perhaps the greatest significance, the ordinance does not set forth a "specified brief period" within which the licensor must "either issue the license or go to court." 380 U.S. at 59. While § 41A-5(a) provides a 30-day time limit for the *issuance* of the license, it does not provide a comparable time for the licensor to go to court after a denial. Moreover, it doesn't even impose a time limit for a final *denial* of the license: "The Chief of Police shall *approve* the issuance of a license . . . within 30 days after receipt of an application *unless* he finds," *inter alia*,

that "[t]he premises . . . have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." (§§ 41A-5(a) and 41A-5(a)(6).) Thus, if those other agencies have not gotten around to acting on the application, the Chief *may not* issue the license. Yet, there are *no* time limits imposed upon the health department, the fire department, or the building official to act on a license application. The net result is that if the health department, fire department or building official have failed to act within 30 days, the ordinance *deprives* the Chief of Police of the *power* to grant the license, yet the ordinance imposes no duty upon him to deny it at that time (nor could it impose such a duty since there has not yet been any necessary indication of disapproval by the health department, the fire department or the building official).

Not only does the ordinance leave the time for the Chief of Police to deny a license open-ended (thereby precluding any guarantee of prompt judicial review), it also forces the applicant to await for an indefinite period the outcome of an additional level of required administrative review. Under § 41A-11, a party who has had his or her license denied, suspended or revoked must appeal the decision of the Chief of Police to a permit and license appeal board in order to exhaust available administrative remedies. That board is then given an additional 60 days before it is even required to *hear* the appeal (see § 2-96(b) set forth at J.A. 39) with no requirement that it render a final administrative determination thereafter within any specified or brief period.[8] Throughout this time period,

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[8] See *Teitel Film Corp. v. Cusack, supra*, 390 U.S. at 141-142 (the time-consuming requirement of a mandatory administrative

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rights of protected expression are throttled solely on the basis of an administrative decision by the Chief of Police. As a result, the licensing scheme not only fails to impose the burden on the licensor to seek judicial review within a specified brief period after the application is filed, but it gives the licensor a virtually unlimited period of time to arrive at a final judicially reviewable decision.

Finally, the ordinance fails to provide for any type of *expedited* judicial review. As this Court pointed out in *National Socialist Party v. Village of Skokie, supra,* 432 U.S. 43 (1977), in the absence of "immediate appellate [judicial] review . . . the state must instead allow a stay." *Id.* at 44. However, in most circumstances the Dallas licensing scheme does not allow any sexually oriented businesses to operate while any judicial or administrative licensing proceedings are pending even before the *trial* court,[9] nor is there any guarantee that any judicial review that might be available (either in the trial court or on direct appeal) will be required in "the shortest fixed period compatible with sound judicial resolution." *Freedman, supra,* 380 U.S. at 39.

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appeal of a film license denial resulted in a "specified" period of pre-judicial restraint that was excessive, in violation of *Freedman*).

[9] There is no mandatory stay while an order denying a license is being appealed. Revocation and suspension orders become effective only after they are upheld by the Permit and License Appeal Board. However, thereafter the revoked licensee's business must immediately close and there is no provision for a mandatory stay pending judicial review.

As demonstrated above, the Dallas licensing scheme lacks each and every one of the five procedural safeguards which *Freedman* articulated in order to ensure that judicial review does not come "too little and too late." Yet, the burden on the City to provide such minimal safeguards is not severe. In at least two other regulatory schemes, the City has established systems for licensor-initiated judicial review.[10] That the City did not choose to employ those safeguards when it enacted its new sexually oriented business licensing law is perhaps telling of the City's true intentions in enacting this onerous ordinance. Certainly where, as here, the subjects of a licensing requirement (i.e., sexually oriented businesses) have historically been met with extreme hostility by many municipal officials, the need for *Freedman*'s procedural safeguards are heightened, not lessened.

For all the reasons above, the license requirement of Dallas City Code § 41A-4(a) must be stricken on its face as an unconstitutional prior restraint of protected expression.

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[10] See, *e.g.*, § 46-16 of the Dallas City Code (set forth at J.A. 91) providing for licensor-initiated judicial review within three days after adverse decisions of the motion picture classification board established under § 46-14 (J.A. 87). Similarly, under § 51-7.705 (reproduced at J.A. 48-49), there is mandatory licensor-initiated judicial review within three days after an individual seeking approval of a sign notifies the City that it disagrees with the City's determination that the sign is illegal because it bears a "commercial message."

II

IN PROVIDING FOR LICENSE DENIAL AND REVOCATION ON THE BASIS OF PRIOR SPEECH OFFENSES, THE DALLAS ORDINANCE IMPOSES A CLASSIC PRIOR RESTRAINT OF THE TYPE PROHIBITED AS FACIALLY UNCONSTITUTIONAL UNDER THE RULE OF *NEAR V. MINNESOTA*, 283 U.S. 697 (1931).

Over half a century ago in *Near v. Minnesota ex. rel. Olson*, 283 U.S. 697 (1931), this Court formulated one of the most unequivocal rules of constitutional law: past instances of unprotected speech cannot justify a prior restraint upon unknown and presumptively protected future expression.

Citing *Near*, Justice O'Connor observed in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 583, n.6 (1983):

> "[W]hen we . . . have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone. Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect."

The Dallas licensing ordinance at issue here authorizes the denial or revocation of the special licenses required for "sexually oriented businesses" on the basis of prior unprotected expression, *e.g.*, a single obscenity offense. Where a license is required before one may engage in speech, "[t]he denial of a license to engage in speech is . . . the classic prior restraint." (Concurring and dissenting opinion of Judge Thornberry in this case below, 837 F.2d at 1306.) If anything, the evil of the prior restraint is at its worst when, as here, the restraint is

predicated upon past speech which has incurred official wrath – the classic *Near* situation.

This Court recognized in *Near* that in reaction to the censorial "power of the licenser" in England, the Framers designed the First Amendment above all else "to prevent previous restraints upon publication." 283 U.S. at 713. A long line of this Court's landmark free speech decisions reaffirms that the First Amendment embodies the Framers' inveterate hostility toward the prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Under this ordinance, a special license is required to operate any communicative business which disseminates sexually oriented materials. § 41A-4. The ordinance mandates *denial* of the required license to persons (or those who reside with persons) who have been convicted of any of a long list of criminal offenses, including obscenity or exposure of "harmful material to [a] minor." § 41A-5(a)(10)(A)(ee), (ff). This disqualification from the right to engage in protected First Amendment activity continues for two years for a single misdemeanor speech crime, and five years for multiple misdemeanor offenses or for a felony. § 41A-5(a)(10)(B). Likewise, the ordinance authorizes *revocation* of a license if the licensee is convicted of an obscenity or "display to minors" offense, or if any employee of the business is convicted of two such offenses occurring on the licensed premises within a year. § 41A-10(b)(5),(6). These license denial and revocation provisions, when predicated upon past instances of

unprotected speech, represent precisely the sort of prior restraint this Court held in *Near v. Minnesota* to be susceptible of no possible saving justification.

In *Near*, this Court invalidated an injunction prohibiting a publisher from issuing future editions of his "scandalous" *Saturday Press*, or any other "scandalous and defamatory" publication, pursuant to a statute allowing such a publication to be "wholly abated" as a "nuisance." 283 U.S. at 701-705, 722-723. As the Court later summarized *Near* in *Kingsley Books v. Brown*, 354 U.S. 436, 445 (1957): "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. . . .'[T]his is of the essence of censorship.'" Quoting from *Near*, 283 U.S. at 713.

Near v. Minnesota addressed and rejected essentially every argument which governments continue to advance in defense of prior restraints like this licensing scheme. The City argued below that this ordinance is to be judged by its statement of purpose. In *Near*, however, the Court emphasized that laws alleged to abridge free speech must be analyzed with "regard to substance and not to mere matters of form[;] . . . the statute must be tested by its operation and effect." *Id.* at 708. This Court has often been required to reaffirm this essential principle, as in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981): "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." See also *Washington v. Davis*, 426 U.S. 229, 243 (1976) ("the operative effect of the law rather than its

purpose is the paramount factor"). It is therefore irrelevant how the law's proponents may seek to characterize either the purpose of the statute, the activity subjected to regulation, or the remedy imposed.

Even if the City's proposed justification were relevant there, it would run afoul of the prior restraint doctrine. The announced purpose of the Dallas ordinance in providing for license revocation on the basis of such prior convictions is to deny the licensee the "opportunity" to repeat the crime. Preamble to Ordinance 19196.[11] The District Court noted approvingly that the license denial and revocation provisions are intended "to avoid licensure of those who have recently shown a predilection toward . . . criminal conduct . . . ." *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1074, n. 34 (N.D.Tex. 1986). Yet this overbroad means of preventing future speech crimes is precisely what the Court prohibited in *Near*, emphatically rejecting the asserted justification "that prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression of the evils of scandal.'" 283 U.S. at 711. The First Amendment requires that our laws "punish the few who abuse rights of speech *after* they break the law" rather than "throttle them . . . beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

As part of its rationale for applying a diminished standard of review to this ordinance, the Court of Appeals in this case concluded that normal First Amendment protections "are less important when a regulation

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[11] App. to Cert. Petition in No. 87-2012 at 73.

restricts the conduct of an ongoing commercial enterprise." 837 F.2d 1298, 1303. Yet, since *Near* this Court has repeatedly rejected such an approach: "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." 283 U.S. at 720. Similarly, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, n. 23 (1978), the Court observed: "It is too late to suggest 'that the dependence of a communication on the expenditure of money . . . operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 16 (1976)). *Accord, Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (rejecting the argument that a lesser standard of review should apply to a motion picture licensing law on the basis of the regulated theaters' commercial nature).

This Court reiterated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), that "mere labels" confer "no talismanic immunity from constitutional limitations." First Amendment scrutiny unquestionably applies whether an obscenity offense is said to create a "nuisance" or to constitute "racketeering activity," as this Court most recently held in *Fort Wayne Books v. Indiana*, 109 S.Ct. 916, 929 (1989): "the State cannot escape the constitutional safeguards of our prior cases by merely recategorizing . . . obscenity violations as 'racketeering.'"

Nor does the form of the *remedy* affect the application of First Amendment standards: "As far back as the decision in *Near v. Minnesota* . . . , this Court has recognized that the way in which a restraint on speech is 'characterized' under State law is of little consequence." *Id.* Under *Near*'s realistic scrutiny of the law's "operation and effect," it would not have mattered if the State had

revoked Near's license or obtained forfeiture of his publishing facilities as a means of stifling future publication of his *Saturday Press*, instead of enjoining its continued publication. This Court rejected the argument that a remedy which directly restrains future speech, however labeled, can be justified on grounds that it is mere "punishment" for having uttered unprotected expression:

> "The object of the statute is not punishment in the ordinary sense, but suppression of the offending newspaper or periodical.
>
> • • •
>
> "The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship." 283 U.S. at 711-712.

Likewise, the Dallas ordinance operates both to suppress the "offending" cabaret, bookstore, or other communicative business in retaliation for unprotected speech, and to place persons denied licenses under effective censorship whereby they may not engage in protected expression.

The Dallas ordinance does not represent the first attempt by government to deal with troublesome speech or attendant evils more "efficiently" by broadly foreclosing future expression, in lieu of the "sensitive tools" required by the First Amendment. Of particular relevance here, the reported cases demonstrate that for at least the past twenty years, states and localities have endeavored under various legal devices to close down adult entertainment businesses. On grounds that adult bookstores or theaters have disseminated materials subsequently adjudicated obscene, prosecutors have padlocked them as "nuisances" or as "racketeering enterprises," and cities have denied or revoked their business licenses. In scores

of state and federal jurisdictions, our lower courts have resoundingly rejected these measures as classic prior restraints of the type clearly prohibited under *Near v. Minnesota*.[12] In this regard, then, the *Dallas* ordinance

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[12] The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. *en banc* 1978) [as to this particular point, all 14 judges of the en banc court were in agreement], aff'd. on other grounds, 445 U.S. 308 (1980); *Pollitt v. Connick*, 596 F.Supp. 261, 269-272 (E.D.La. 1984); *General Corp. v. Sweeton*, 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976) cert. den. 429 U.S. 922 (1976); *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla.1971); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *People v. Sequoia Books*, 165 Ill.App.3d 143, 518 N.E.2d 775 (Ill.App.1988), *aff'd.*, ___ N.E.2d ___ (Ill. 1989); *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind.App.1973); *Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Giarrusso v. D'Iberville Gallery*, 295 So.2d 891 (La.App. 1974); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480 (La. 1974); *Parish of Jefferson v. Bayou Landing Ltd., Inc.*, Inc., 350 So.2d 158 (La.1977); *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La.App. 1972); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emberg*, 347 A.2d 712 (Penn. 1975); and *New Rivieria Arts Theatre v. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967). See also *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 494-495 (9th Cir. 1984), rev'd. on other grounds sub nom. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Nihiser v. Sendak*, 405 F.Supp. 482, 491-492 (N.D.Ind. 1974), vacated and remanded on other grounds, 423 U.S. 976 (1975), order re-entered August 16, 1976 (unpub.), *aff'd.* 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd*, 420 U.S. 592, 612, n. 23 (1975); cf. *Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio 1974).

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stands in defiance of *Near* and of contemporary controlling decisions which had seemingly resolved this very issue, particularly in the Fifth Circuit.[13]

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The following cases have held unconstitutional laws which allow a license or permit to be either revoked or denied upon a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria*, 619 F.2d 1203, 1217-1220 (7th Cir. 1980), *aff'g.* 475 F.Supp. 1199, 1207-09 (C.D.Ill. 1979); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Cohen v. City of Daleville, Alabama*, 695 F.Supp. 1168 (M.D.Ala. 1988); *Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville* 480 F.Supp. 151 (M.D.Fla. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F.Supp. 820 (D.Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Natco Theatres Inc. v. Ratner*, 463 F.Supp. 1124 (S.D.N.Y. 1979); *Oregon Bookmark Corp v. Schrunk*, 321 F.Supp. 639 (D.Oregon 1970); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co., Bd. of Sup'rs.*, 128 Cal.App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Delevan v. Thomas*, 31 Ill.App.3d 630, 334 N.E.2d 190 (1975); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); see also *International Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); *cf. Chulchian v. City of Indianapolis*, 477 F.Supp. 128, 131-132 (S.D.Ind. 1979), *aff'd.*, 633 F.2d 27, 30 (7th Cir. 1980); *Marks v. City of Newport, Ky.*, 344 F.Supp. 675 (E.D.Ky. 1972).

[13] *See Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 165-166 (5th Cir. *en banc* 1978), ignored by the majority below

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Addressing a similar license revocation law, the court in *Cornflower Entertainment, Inc. v. Salt Lake City*, 485 F.Supp. 777, 786 (D.Utah 1980) observed: "To reason that an involuntary closure of a motion picture theatre for past obscenity violations does not constitute a prior restraint is clearly contrary to the Supreme Court's definition of prior restraint." Virtually every court to address this issue has applied *Near*'s prohibition of this type of restraint as utterly beyond dispute, as did the Court of Appeals in *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1552 (5th Cir. 1983), striking down just such an ordinance providing for the one-year revocation of a theater's or bookstore's license upon conviction for obscenity:

> "[T]he City can no more impose such a prior restraint on the plaintiff than it could by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place."

The correctness of this avalanche of lower court authority has been underscored by this Court's continued elaboration upon the doctrine established in *Near* in the many cases invalidating prior restraints in their various forms. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 444 (1938);

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although clearly dispositive of the license denial/revocation issue. *Cf. Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777, 785-786 (D. Utah 1980) (citing the Court of Appeals' *en banc* decision in *Vance* as authority for invalidating ordinance permitting revocation or suspension of theater licenses on the basis of obscenity convictions).

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); *New York Times v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

In *Vance v. Universal Amusement Co., supra*, this Court affirmed an *en banc* Fifth Circuit decision which struck down a Texas public nuisance statute authorizing preliminary injunctions of indefinite duration against the future exhibition of unnamed "obscene" materials by those who had committed a prior obscenity violation. Both this Court and the lower courts deemed this procedure a prior restraint devoid of First Amendment safeguards. The Court of Appeals in *Vance* had also addressed another statutory provision which was not appealed to this Court, the nuisance statute's abatement provision which apparently authorized closure of any errant theater which had exhibited an obscene film.

> "Thus, future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in *Near v. Minnesota*." *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 165 (5th Cir. *en banc* 1978).

Because "[a]pplication of the one-year closing provisions in obscenity cases under the Texas nuisance statutes would constitute an impermissible prior restraint," the Court of Appeals construed the padlocking statute as inapplicable to obscenity violations. 587 F.2d at 166.

The point is not simply that these license disqualification provisions should have been invalidated under

the Court of Appeals decision in *Vance* and an immense, virtually unanimous body of decisions from other jurisdictions, but more fundamentally that those decisions were compelled by this Court's unswerving adherence to the rule announced in *Near*, a rule which embodies the paramount concerns sought to be protected by the First Amendment. As Justice O'Connor emphasized in *Minneapolis Star, supra*, 460 U.S. at 583, n.6 (1983), such prior restraints "strike to the core of the Framers' concerns," and conclusively so in cases of an absolute prospective bar on *protected* speech.

Unfortunately, governments will persist, as here, in urging this Court to "pull one thread" from the protective fabric of established civil liberties, in furtherance of their efforts to regulate on behalf of what they deem to be other, more important public interests. As is so often the case, however, a law aiming at those involved in what the district court deemed "unpopular" expression[14] poses the danger of unraveling that garment which protects us all. In this case, one of the doctrinal threads inconveniencing the City of Dallas is the rule of *Near v. Minnesota*, the very bedrock of the constitutional protection of free speech. If that rule is to remain in effect, the Dallas ordinance in this respect must be unequivocally condemned as the forbidden "essence of censorship."

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[14] 648 F.Supp. at 1063.

III

LICENSE DENIAL, SUSPENSION AND REVOCATION ON THE BASIS OF NON-SPEECH VIOLATIONS ALSO REPRESENT PRIOR RESTRAINTS WHICH CANNOT WITHSTAND STRICT SCRUTINY AND ARE THEREFORE INVALID UNDER THE FIRST AMENDMENT.

In addition to its paradigm *Near* restraint for past unprotected speech, Dallas' licensing scheme authorizes officials to deny, suspend or revoke their "permission" to engage in First Amendment activity on the basis of any number of other crimes and assorted derelictions. Because the ordinance imposes a licensing requirement, and withholding the required license operates as an outright *ban*, rather than a mere *burden*,[15] on all future protected expression, these provisions as well must withstand the extremely strict scrutiny of the prior restraint doctrine. These censorial license disqualifications are neither narrowly tailored nor necessary to achieve a compelling governmental interest, and therefore must yield to the overriding First Amendment interests at stake.

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[15] Whereas any outright *ban* upon future speech comes to the courts facing "a heavy presumption against its constitutional validity," *Vance, supra*, 445 U.S. at 316, n.13, a *burden* upon speech *may* trigger strict scrutiny, depending upon its nature and extent. Examples of laws which burden speech but do not bar it completely include taxes and zoning laws. Even though these burdens do not effectuate a prior restraint, if taxes are imposed selectively or zoning laws "restrict in any significant way" the opportunity to speak, they too will encounter strict scrutiny and normally will be found impermissible. See *Minneapolis Star, supra; Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976).

Under the Dallas ordinance, applicants will be *denied* a license if they, or someone with whom they reside, has been convicted of various enumerated offenses such as prostitution, public lewdness, sexual assault, or incest, within either two or five years. (See Argument II and § 41A-5(a)(10).) A license will be *revoked* for the subsequent commission of any of these crimes, either by the licensee or, under certain circumstances, by the business' employees. § 41A-10(b)5,6. The license may be *suspended* for, *inter alia*, the licensee's or an employee's "excessive use of alcoholic beverages" on the premises, and revoked for two suspensions within a year. § 41A-9(2); § 41A-10(a). In short, the ordinance provides city officials with an extensive variety of justifications for closing businesses engaged in officially disfavored speech.

These provisions trigger the most exacting First Amendment scrutiny because the ordinance imposes an absolute ban upon future protected expression; it therefore represents a prior restraint which bears a "heavy presumption against its constitutional validity." *Vance, supra*, 445 U.S. at 316, n.13. Under the strict scrutiny of the First Amendment, the City "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231.

Given this required standard of analysis, the courts below clearly erred in applying a diminished standard of review in this case. As Judge Thornberry concluded in his concurring and dissenting opinion below:

> "Applying a time, place and manner analysis to a licensing statute that completely bans certain classes of persons from speaking is illogical . . . . A person

who is completely banned from speech because, for example, he has in the past been convicted of some crime has no other avenue of communication." 837 F.2d at 1310.

On this basis, Judge Thornberry correctly distinguished *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Respondents will undoubtedly rely upon the authority of *Arcara* in an attempt to justify these provisions for license denial and revocation on grounds of non-speech-related predicate acts or omissions.[16] Because this ordinance clearly creates a prior restraint implicating First Amendment interests, reliance upon *Arcara* in this situation is misplaced.

In *Arcara*, this Court upheld the application of a generally-applicable New York nuisance statute to padlock the premises of a bookstore for one year, because its proprietors had knowingly allowed the premises to be used for purposes of prostitution. This result was grounded fundamentally on the Court's conclusion that First Amendment analysis did not apply at all in *Arcara*, in part because of two key factors not present here. The Court emphasized that in the absence of these factors, First Amendment scrutiny would apply.

First, the padlocking in *Arcara* imposed the *burden* of moving to another location but did not directly *ban* or prohibit the continued operation of the bookstore as a

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[16] Of course, respondents cannot hope to use *Arcara* as authority for the proposition that a license could be denied for predicate *speech* offenses such as obscenity, because the Court in *Arcara* emphatically distinguished the case in which "it was conduct with a significant expressive element which drew the legal remedy in the first place." 478 U.S. at 706.

going concern. In contrast, the denial of a license under the Dallas ordinance imposes a complete *ban* upon protected expression, i.e., a prior restraint. The closure order in *Arcara* was narrowly directed only at the premises found to be the situs of on-going nuisance activity, and Chief Justice Burger stressed that the proprietors "remain free to sell the same materials at another location." *Id.* at 705. The direct and complete ban authorized by the Dallas ordinance, which entirely prohibits one denied a license from engaging in certain forms of protected speech activity at any location, is a qualitatively different kind of restraint upon First Amendment rights.

Second, Justice O'Connor's concurrence (which also represented a majority of the Court on this point) emphasized that if a law were used to close down a bookstore "because of the perceived secondary effects of having a purveyor of [indecent] books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review," i.e., in this case, the extremely exacting scrutiny of the prior restraint doctrine. Both courts below found that the entire ordinance, including its non-speech license disqualification criteria, was enacted because of the perceived secondary effects of having an adult bookstore or cabaret in the neighborhood. *See* 648 F. Supp. at 1064-1066; 837 F.2d at 1303. For this reason as well, these provisions "implicate First Amendment concerns and require [First Amendment] analysis." *Id.*

The applicable standard of First Amendment scrutiny had previously been faithfully applied both in the Fifth Circuit and elsewhere to invalidate this type of criterion

for license-denial either as conferring undue discretion or substantively as a prior restraint. In *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), this same Court of Appeals invalidated an ordinance requiring a license for the distribution of literature and solicitation of funds at the Dallas airport. The required permit could be denied on several grounds, including conviction of a felony or other offense "involving moral turpitude." The court struck the licensing scheme in its entirety for its lack of *Freedman* safeguards, and held more particularly that most of the grounds for permit denial were invalid either as involving undue discretion or as otherwise impermissible prior restraints:

> "[G]overnmental authorities may not, except in demanding circumstances, deny access to a public forum in anticipation of consequences that may flow from the contemplated activity. *Punishment for criminal behavior must be government's response to an abuse of the privilege to use a public forum; prospective restraints are unconstitutional.*" 663 F.2d at 628 (emphasis added).

Accordingly, the court concluded the provision for denial of a permit to persons convicted of crimes was patently invalid.

> "To sustain such a total abrogation of First Amendment rights, the government must show that the speech prohibited will 'surely result in direct, immediate and irreparable damage . . . ' [quoting *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971)]. *That the applicant has been convicted of a crime in the past is not a sufficient reason for his blanket exclusion in the future.*

* * *

> *"Persons with prior criminal records are not First Amendment outcasts." Id.* at 629-630 (emphasis added).

In striking down this Dallas ordinance, the *Fernandes* court followed an earlier Fifth Circuit decision, *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979), invalidating analogous permit revocation portions of a similar ordinance governing solicitation at the Atlanta airport. To revoke a permit for violations under the airport ordinance, the court held, "is simply a recipe for an unlawful prior restraint." 601 F.2d at 832. The Court held that the City could not possibly justify a prior restraint by asserting

> "that once a sinner, always a sinner; anyone who has violated the ordinance once is likely to violate it again. We have recently held, en banc, that no prior restraint may be based on this broad generalization." *Id.* at 833, citing *Universal Amusement Co. v. Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978).

In addition to these Fifth Circuit cases, indistinguishable in principle from the issue of license denial and revocation under the Dallas sexually oriented business ordinance, the Court of Appeals in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), addressed and invalidated materially identical provisions of an adult entertainment licensing ordinance. The Peoria ordinance provided for the denial, suspension or revocation of an adult bookstore license to anyone convicted during the preceding four years of any felony, any prostitution-related offense, any obscenity-related offense, or any offense "opposed to decency and morality." 619 F.2d at 1218.

The Court of Appeals in *Genusa* rejected outright these provisions "totally prohibit[ing] certain classes of persons from selling in Peoria books that are protected by the First Amendment." *Id.* at 1218-1219. The court first rejected as unsubstantiated the City's assertion "that those who have committed past crimes or offenses are more likely to commit them again, and that the prohibition of the ordinance will, by keeping the past offender and the adult use separate, cause a decrease in crime." *Id.* at 1219. Even if this broad empirical assertion were proved, the court doubted these contentions could "legitimize the broad prior restraint on First Amendment freedoms that the ordinance seeks to impose." *Id.*

> "We know of no doctrine that permits the state to deny a person First Amendment liberties . . . solely because that person was once convicted of a crime or other offense." *Id.* at 1219, n.40.

Again, these decisions of the Courts of Appeals are discussed not merely to point out the radical departure of the courts below from the established precedent of their own circuit, nor to suggest that their authority binds this Court. Rather, these cases represent the faithful application of First Amendment principles announced by this Court, fundamental constitutional groundrules which compel a result contrary to that reached by the Court of Appeals in this case. The Dallas ordinance's provisions for prospectively denying the right to speak cannot by any means withstand strict scrutiny under the First Amendment and particularly under the prior restraint doctrine.

As the courts concluded in *Fernandes, Eaves,* and *Genusa,* a broad prospective restraint on the ability to

participate in protected First Amendment activity simply cannot be justified as a narrowly tailored or necessary means to achieve the City's crime-prevention objectives. In many such cases, there will in fact be no nexus at all between the prior crime and the licensee's operation of an expressive business; nor will denial of a license logically operate to deter future criminal conduct. The connection between the criminal offenses and operation of a communicative business is far too tenuous to support a total restraint on protected expression.

In sum, the City has not demonstrated – and could not demonstrate – that its purpose of preventing the enumerated crimes cannot be more narrowly achieved by enforcement of the criminal laws rather than by withdrawing the privilege to engage in First Amendment activities. The exercise of First Amendment freedoms is simply deemed too precious a right under our constitutional system to allow for this kind of broad pre-emptive strike in an effort to anticipate, under loosely-supported assumptions, future criminal conduct which may or may not occur. Accordingly, these license disqualification provisions must be stricken as impermissible prior restraints.

IV

THE DALLAS LICENSING REQUIREMENT IS SO RIDDLED WITH UNCONSTITUTIONAL FEATURES THAT IT MUST BE STRICKEN IN ITS ENTIRETY.

Although petitioners originally brought these lawsuits challenging a wide variety of features in Chapter 41A of the Dallas City Code, the only issues remaining

before this Court concern the constitutionality of the licensing requirement of § 41A-4(a). Petitioners respectfully submit that the only appropriate remedy would be the facial invalidation of that requirement.

First, the absence of *Freedman* procedural safeguards from the licensing scheme alone requires its facial invalidation *en toto*. However, even apart from the ordinance's *Freedman* problems, it would have to be facially invalidated for substantial overbreadth in any event. Where, as here, "the overbreadth of [a] statute, in relation to its legitimate reach, is substantial[, it] warrants a declaration of facial invalidity." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, n.12 (1985). Separate from its *Freedman* deficiencies, this licensing law is so riddled with unconstitutional features that its overbreadth is indisputably substantial compared to its legitimate reach.

As discussed in Point II, the various provisions for license denial, non-renewal, suspension or revocation due to prior speech offenses are patently unconstitutional under *Near v. Minnesota, supra*. Similarly, the comparable provisions justifying denial, etc., based on prior non-speech offenses are equally impermissible because they also operate as prior restraints and do not constitute the least restrictive means of accomplishing any compelling state interests.

However, even apart from those defects, the ordinance is virtually saturated with additional clearly unconstitutional features. First, it is replete with *discretionary* substantive licensing criteria, the most notable of which are listed below:

1. Sections 41A-9(5) and 41A-5(a)(8), allow the Chief of Police to suspend or deny a license, respectively, where the licensee or applicant has, in the subjective and sole opinion of the chief, "demonstrated that he is unable to operate . . . a sexually oriented business in a peaceful and law-abiding manner . . . ."

2. The chief has discretion under § 41A-9(2) to suspend a license if he is of the opinion that the licensee or an employee has "engaged in excessive use" of alcohol while on the premises.

3. Under § 41A-5(a)(3), the Chief of Police has discretion to deny a license if, in his opinion the applicant has "failed to provide information 'reasonably necessary' for issuance of the license."

4. Under § 41A-8(b), renewal of a license after a prior renewal application has been turned down is only discretionary, not mandatory, *even after the basis for the prior denial has been corrected*!

5. Similarly, under § 41A-10(e), reinstatement of the license after revocation is only discretionary, not mandatory, *even after the basis for revocation has been corrected*!

Each of the foregoing provisions provides the Chief with subjective and discretionary criteria which may be utilized for the wrongful denial or nonrenewal of a license, notwithstanding this Court's last term reiteration that periodic licensing laws for businesses engaged in speech activities must be stricken on their face as unconstitutional if they lack objective standards to limit the licensor's discretion. *City of Lakewood v. Plain Dealer, supra*. This Court noted that "[s]tandards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech." 108 S.Ct. at

2144. None of the three dissenting judges in *Plain Dealer* disagreed with these propositions. Instead, the dissent was exclusively based on the asserted absence of a First Amendment right to put a newsrack *on a public sidewalk*. The entire Court agreed that the *Lovell - Freedman* line of cases would apply where the First Amendment rights of a business are subjected to a license requirement. 108 S.Ct. at 2152-53, 55.

However, in the present case there is no question but that petitioners' sexually oriented communicative businesses are engaged in activity protected by the First Amendment. Accordingly, there would appear to be no dispute as to petitioners' entitlement to facially challenge these discretionary provisions. The applicable rule, then, is that stated by this Court in *Shuttlesworth v. City of Birmingham, supra*: "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." 394 U.S. at 150-151.[17] Other examples of patently unconstitutional provisions in this ordinance abound:

1. Under § 41A-8(a), an applicant seeking renewal must go through the full initial license application process set forth in § 41A-4. Nonrenewal of a license could then be justified for anything as minor as an inability to get approval of the building official because certain wiring might not be up to code (see § 41A-5(a)(6)). Yet, under

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[17] Accord *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 683 (1968) (holding that "[t]he vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing").

§ 41A-8(b) once such a renewal request is denied, the Chief is expressly forbidden from reconsidering the renewal for "at least 90 days" *even though he "finds that the basis for denial of the renewal license has been corrected or abated . . . ."* [Emphasis added.]

2. Similarly, under § 41A-10(e), a *revoked* license cannot be reinstated after "the basis for the revocation has been corrected or abated" until "at least 90 days have elapsed since the date the revocation became effective."[18]

3. A license cannot be granted under § 41A-5(a)(5) if the applicant merely *resides* with a person whose license was denied within the prior 12 months for any reason, including being overdue in paying any taxes or license fees (§ 41A-5(a)(2)), failing to meet any building, health or fire code requirements (§ 41A-5(a)(6)), or failing to provide all "information reasonably necessary." (§ 41A-5(a)(3)). *All of these conditions are easily remediable but the ban on licensure nonetheless goes on for a full year!* The arbitrariness and overbreadth of this section is additionally evidenced by the fact that this limitation results from licensing difficulties experienced by one with whom the applicant merely *resides*. [Yet, the City inexplicably did not impose a comparable restriction where it is the *applicant himself* who has had such prior licensing difficulties!][19]

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[18] Where the basis for revocation is a prior criminal conviction, the minimum period of revocation is even greater, either two or five years. See § 41A-10(e) and 41A-5(a)(10)(B).

[19] It is true, as mentioned above, that an applicant who has been denied *renewal* or whose license has been *revoked* must await a minimum 90 day period before seeking relicensure. However, as to those applicants seeking an initial license, the

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4. A license can also be denied (see § 41A-5(a)(9)), suspended (see § 41A-9(1)), or revoked (see § 41A-10(a)) if the applicant or licensee has violated the inspection requirements of § 41A-7. Under § 41A-7(a), the applicant is compelled to allow his or her premises to be fully inspected at any time it is occupied or open for business by a virtually endless list of public agencies. These include:

   (a) the police department,

   (b) the health department,

   (c) the fire department,

   (d) the housing and neighborhood services department,

   (e) the building inspection division.

This requirement for warrantless inspections by so broad a list of government agencies must be found deficient under the Fourth Amendment principles articulated by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) ("there is no basis for the notion that because a retail [adult book] store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees.")

In sum, the licensing law challenged in this case is so replete with constitutional deficiencies that the only

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City failed to impose upon them the same one year ban on relicensure as they have imposed on those applicants who reside with persons who have previously been denied a license. This is the epitome of arbitrariness and irrationality.

appropriate remedy is the facial invalidation of the licensing requirement of § 41A-4(a).

CONCLUSION

For all of the reasons above, this Court should reverse the order of the Court of Appeals and strike down the license requirement of Dallas City Code § 41A-4(a) on its face.

DATED: May 26, 1989 Respectfully submitted,

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